

1986

Elmer Lee Phillips v. Dr. J. A. Smith, Jr. : Brief of Respondent

Utah Supreme Court

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STATE OF UTAH
BRIEF

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1986

DOCKET NO

IN THE SUPREME COURT OF THE STATE OF UTAH
20873

ELMER LEE PHILLIPS and
NILDA PHILLIPS,

Plaintiffs-Appellants

vs.

DR. J. A. SMITH, JR.,
UNIVERSITY MEDICAL CENTER,
and JANE DOES NOS. I through V,
Ex Rel The Law Firm of
UNGRICHT, RANDLE & DEAMER

Defendants-Respondents

CASE NO. 20873

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FILED

JAN 15 1986

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

ELMER LEE PHILLIPS and)	
NILDA PHILLIPS,)	
)	
Plaintiffs-Appellants)	
)	
vs.)	CASE NO. 20873
)	
DR. J. A. SMITH, JR.,)	
UNIVERSITY MEDICAL CENTER,)	
and JANE DOES NOS. I through V,)	
<u>Ex Rel</u> The Law Firm of)	
UNGRICHT, RANDLE & DEAMER)	
)	
Defendants-Respondents)	

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IN THE SUPREME COURT OF THE STATE OF UTAH

ELMER LEE PHILLIPS and)	
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Plaintiffs-Appellants)	
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vs.)	CASE NO. 20873
)	
DR. J. A. SMITH, JR.,)	
UNIVERSITY MEDICAL CENTER,)	
and JANE DOES. NOS. I through V,)	
<u>Ex Rel</u> The Law Firm of)	
UNGRICHT, RANDLE & DEAMER)	
)	
Defendants-Respondents)	

BRIEF OF RESPONDENT

NATURE OF CASE

This is an appeal from an Order of the Honorable John A. Rokich, District Judge, awarding Law Firm¹ their reasonable attorney's fees for services rendered in the amount of \$13,314.78.

NATURE OF RELIEF SOUGHT

Respondent Law Firm seeks affirmation of the Order of Judge Rokich awarding attorney's fees, plus remand to the District Court for the determination and award of appropriate fees,

¹All references to "Law Firm" are to the Respondent, the law firm of Ungricht, Randle & Deamer of Salt Lake City, Utah.

interest and costs of respondent Law Firm on appeal, which appellants are contractually obligated to pay.

FACTS

Respondent Law Firm generally agrees with appellant's facts but adds the additional facts not set forth in appellants' Brief as follows:

1. Appellant Elmer Lee Phillips was operated on for cancer of the bladder. During the course of the operation, the attending physician or people under his control left a sponge in plaintiff. This sponge was subsequently removed three or four weeks later upon plaintiff's complaining of complications, including discomfort and fever. Upon the subsequent operation appellant alleged that the doctor and the medical center jarred loose a tube from the kidneys to the bladder, thereby causing plaintiff to suffer further complications, including a leakage of urine in the interior cavity of his body. There were additional allegations that plaintiff was subsequently mistreated and maltreated by nurses and attending doctors during the recovery phase. (Record, p.59).

2. Mr. Phillips was a gentleman in his sixties, who had been on Social Security disability since the 1940s, was employed as a janitor at his wife's nursing home, and spent time in purchasing and fixing old automobiles. He was dying of cancer

and had been given an eighteen-month life expectancy by the attending physicians.² He had no substantial salary history and had no dependent children as all of his children were grown and married. His wife was independently wealthy and was not supported by him. (Record, p.59)

3. In November, 1983, respondent Law Firm was approached by appellants to file a malpractice lawsuit against the University Medical Center and Dr. J. A. Smith, Jr.

4. Appellants signed a written agreement (attached as Exhibit "C" to appellant's Brief) retaining respondent Law Firm to represent appellants.

5. Respondent Law Firm did legal research, sought and obtained after some dispute a large volume of medical records, on June 19, 1984, filed the required 90-day Notice of Intent to Commence an Action, met repeatedly with appellants, prepared a Complaint, and engaged in settlement negotiations with defendants' attorneys over a significant period of time.

6. Respondent Law Firm obtained a settlement offer of \$39,984.31 for appellants' case. (Record, p.50). The settlement offer letter dated June 25, 1984 from Snow, Christensen & Martineau is attached hereto as Exhibit "A" and by reference made a part hereof.

7. Appellants refused to accept the offer of settlement and

²Mr. Phillips was deceased at the time of the proceedings in the District Court.

terminated representation by respondent Law Firm, wherein they had agreed to pay a one-third (1/3) contingency fee, plus a retainer for costs in the amount of \$500. Thereafter they retained their current attorneys with an agreement to pay said attorneys only a one-quarter (1/4) contingency fee with no retainer for costs. (Supplemental Affidavit of Michael L. Deamer, Record, p.88).

8. Shortly after respondent Law Firm was terminated, it filed for recording in the office of the County Recorder of both Utah and Salt Lake Counties, a Notice of Attorney's Lien in the amount of \$13,161.44. (Copies in Record, p.55-58).

9. After termination of respondent Law Firm, respondent Law Firm refunded the unused balance of costs advanced by appellants, fully cooperated with appellant's new attorney Mr. Harrison, and acted in all regards to preserve appellants' case.

10. Approximately eight months later appellants settled their case out of court on terms identical to the settlement offer previously obtained by respondent Law Firm.³ (Supplemental Affidavit of Michael L. Deamer, Record, p.87-88).

11. The attorney for defendants Dr. J. A. Smith, Jr. and the University Medical Center (not parties to this appeal) filed a

³The case was settled for \$20,000 cash, plus a pass-through of insurance proceeds due the defendants for Mr. Phillips' treatment in the amount of \$19,984.31.

motion with the court for determination of Law Firm's attorneys' fee. (Record, p.122)

12. The attorney for appellants, Mr. Harrison, stipulated that the court could hear and determine the issue of respondent's attorneys' fees on the record in this proceeding. Quoted in Argument, Point I.

13. In the course of proceeding on this matter, appellants' attorney has refused to sign Orders approving them as to form, has sought a rehearing of the Court's ruling, which was denied, and furthermore has not posted the bond required for an appeal to this Court or made other acceptable arrangements regarding settlement proceeds that appellants have already received constituting the fee that respondent Law Firm seeks to obtain.

SUMMARY OF ARGUMENT

1. Appellants are estopped from asserting the necessity of a separate action to determine fees because they waived their right to a separate hearing.

2. There are no material issues of fact to be resolved.

3. Respondent is entitled to its attorney's liens and fees pursuant to written contract and statutes of the State of Utah for legal services rendered.

4. Respondent Law Firm is entitled to an award of additional attorneys' fees, court costs and interest pursuant to contract.

ARGUMENT

POINT I

APPELLANTS ARE ESTOPPED FROM ASSERTING THE NECESSITY
OF A SEPARATE ACTION TO DETERMINE FEES.

The appellants claim error in the fact that the District Court made a determination of fees without a separate action being brought by Law Firm to recover the same. Yet, at the same time, the only relief requested is a remand to the District Court for the purpose of taking additional evidence.

The parties are the same, the venue is the same, and appellants, by stipulation, waived the necessity of a separate action for fees, even if a separate action for recovery of fees were otherwise required.

The stipulation of appellants' counsel was as follows (See Record, pp.124-125; 128-129):

"The Court: Is it stipulated that I can hear this matter with regards to the lien, attorney's lien for fees in this matter?

"Mr. Harrison: Yes.

"The Court: So, there will be no need for any type of further action and based upon what is presented to me today I can make a decision as to whether or not they're entitled to fees. (Emphasis added).

"Mr. Harrison: I think if the Court looks at the law -- I brought a case that should be dispositive on the issue, your Honor, and I believe once the court reviews that case that the course will be clear.

"So, I guess with that provision that I suggest that I think the court should hear the issue of the attorney's lien that was filed by predecessor counsel, and I think

that it is appropriate prior to defendant's and our settlement being entered as a court order.

"The Court: Is that agreeable with all parties, then?

"Mr. Randle: That's agreed, your Honor.

"The Court: Is that agreeable, Mr. Harrison?

"Mr. Harrison: Yes.

"The Court: So, we all understand that I will determine, first of all, whether they have a right to a lien. If they have a right to a lien, there may be the necessity of an evidentiary hearing to determine the amount of fees you're entitled to.

"Is that stipulated to by all parties, that that is the issue before me?

"Mr. Harrison: Yes.

"Mr. Randle: Yes.

Appellant cannot now be heard to say that respondent Law Firm must bring a separate action in the lower court to adjudicate its rights to attorneys' fees.

POINT II

THERE ARE NO MATERIAL ISSUES OF FACT TO BE RESOLVED.

Appellants' counsel was responsible for suggesting that additional facts be submitted by affidavit. (Record, p.150). No additional hearing was requested nor did appellants' counsel raise any procedural objection to the manner of proceeding, until after the District Court had ruled.

It is claimed that material issues of fact were raised by

the affidavits that precluded the District Court from awarding fees to this Law Firm. Appellants' Brief does not clearly outline what the alleged factual disputes are.

The big point they sought to make in the District Court, and apparently seek to make before this Court, is that there was no acceptance of the defendants' June 25, 1984 offer, and therefore this Law Firm had not completed its contract and was not entitled to a lien or fees.

Whether or not respondent Law Firm had actually achieved final settlement was completely immaterial to the decision of the District Court, because the efforts of counsel had produced an unconditional offer of settlement, and the only reason the settlement was not consummated was that the appellants refused, at that point in time, to accept it. The following comments of the Court are illustrative of its reasoning (Record, pp.136-138):

"The Court: So, after that transaction and those negotiations, then Mr. Harrison was then engaged, after the \$39,000 offer was made?

"Mr. Randle: Yes.

"The Court: What is your understanding, Mr. Harrison.

"Mr. Harrison: My understanding was the Phillips came to my office and said, "Look, we're not happy with--"

"The Court: Did they tell you what they had been offered at that time.

"Mr. Harrison: No. They advised that they had the letter. I looked at it.

"The Court: So, your testimony is that you were not aware of the fact that they had an offer in hand for

\$39,000 plus?

"Mr. Harrison: That is correct.

"The Court: You may proceed.

"Mr. Harrison: So at that point I commenced representation.

"I guess I would note that the letter that counsel relies on apparently is a letter also in June from Mr. Lybbert where again it is a proposed offer of settlement, but it is not a confirmation. And I think that is essential for the court's determination here.

"The last paragraph says it will require one week to process a settlement draft after receiving notification of acceptance.

"That was the problem, the Phillips would not accept the settlement offered.

"The Court: But they had an offer of \$39,000.

"Mr. Harrison: May have.

"The Court: According to Mr. Lybbert's letter they did have an offer. If the Phillips accepted it, they struck a deal. He would order a draft and prepare a release and that would have taken care of the case.

"Mr. Harrison. But apparently they were not satisfied. As I have found through my months of representing them, they just were very difficult to deal with in the sense of coming to accept a formal settlement.

"I would suggest, your Honor, if we can turn to this case that is very important, because I believe it is right on point. It is a 1968 case and it talks about the fact that a charging lien, which is the kind of lien we're talking about, does not attach when the work is sterile or produces no fruit, and when, in fact, you withdraw from the case at the time that there is a law suit yet to be tried.

"The Court: I don't agree with that statement. I don't think the case was sterile at that time. Instead the attorney was producing fruit. In this case it

appears that he had \$39,000.

"Mr. Harrison: Well, I guess I would respond by saying that the parties--

"The Court: The attorneys negotiated a \$39,000 settlement at that juncture, and the fact that the Phillips would not accept it was not the fault of the attorneys. But they did negotiate a settlement worth \$39,000.

"Therefore, I don't think their efforts were sterile.

There is no dispute that appellants retained respondent Law Firm to represent them. There is no dispute that they authorized respondent Law Firm to negotiate a settlement of their claims with defendants. There is no dispute that those negotiations resulted in the formal offer of settlement shown in Exhibit "A", prior to the termination of respondent Law Firm's employment. There is no dispute that appellants refused to accept the written offer when presented to them. There is no dispute that appellants subsequently accepted the same terms of settlement. There is no dispute as to the amount of fees earned by respondent Law Firm if the District Court's Order is affirmed.

POINT III

RESPONDENT IS ENTITLED TO ITS ATTORNEY'S LIEN AND FEES
PURSUANT TO WRITTEN CONTRACT AND STATUTES OF THE STATE
OF UTAH FOR LEGAL SERVICES RENDERED.

Respondent claims entitlement to a lien upon the proceeds of the settlement pursuant to (1) its written agreement attached as Exhibit "C" to appellants' Brief, and (2) the provisions of Utah law.

Utah Code Annotated 78-52-41 provides:

"Compensation - lien - The compensation of an attorney and counsel for his services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision, or judgment in his client's favor and to the proceeds thereof in whosoever's hands they may come, and cannot be affected by any settlement between the parties before or after judgment."

The above cited statute provides that an attorney has a lien on his client's cause of action, which lien attaches to a judgment in his client's favor and "... to the proceeds thereof, in whosoever's hands they may come...". Furthermore, said lien cannot be affected by any settlement between the parties before or after judgment.

In order for respondent Law Firm to take legal action as against the University Medical Center, it was required to file at least a 90-day notice pursuant to statute with the State Agency of a Claim and Notice of Intent to Commence an Action, which was done on January 19, 1984. Prior to this time, respondent Law Firm had spent a considerable amount of time researching the case and in attempting to obtain a large volume of medical records from the University Medical Center, which were subsequently obtained. Respondent Law Firm's counsel handling the matter, Michael L. Deamer and W. Jerry Ungricht, met with plaintiffs on numerous occasions in February, March and April to redefine the

facts and prepare the case. On March 28, 1984, at a point in time when plaintiffs could not file a legal action because the 90-day statutory period had not run, respondent Law Firm met in settlement conference with Merlin Lybbert, the attorney for the health care providers, to discuss an out-of-court settlement. A complaint and documents to be filed with the Court were prepared but were never filed. Serious settlement negotiations continued and there was an exchange of correspondence. Ultimately, respondent Law Firm obtained for appellants the offer noted. The offer was in excess of what respondent Law Firm had evaluated the case to be worth and strongly encouraged appellants to accept it.

The Courts have long recognized the right of an attorney to a charging lien for his services to secure compensation for obtaining a settlement for his client. The attorney's lien recognized by common law gives the attorney the right to recover his taxable costs and his fees and money expended on behalf of his client from a fund recovered by his aid:

"... and the right to have the court interfere to prevent payment by the judgment debtor to the creditor in fraud of the attorney's right to it and to prevent or set aside assignments or settlements made in fraud of his right. It entitles the attorney to apply to the court for disbursement of proceeds realized by the enforcement of the judgment." 7 Am. Jur. 2d Attorneys at Law, §324 at p. 337 citing the well established case of Nutt v. Knut, 200 U.S. 12, 15 L.ed. 348, 26 S.Ct. 218, (1906).

The Utah Supreme Court in Midvale Motors v. Saunders, 21 U2d 181, 442 P2d 938 (1968), although holding that the attorney in

that specific case was not entitled to a lien since he was discharged at a point in time when he had achieved no results, stated:

"It is to be noted that the statute above set out gives to an attorney what is called a charging lien which attaches to a verdict, report, decision or judgment in his client's favor and to the proceeds thereof, etc." At the time of the order purportedly giving liens to the attorney, the plaintiff had no verdict, report, decision or judgment in his favor and, of course, he had not proceeds therefrom. The statute gives a lien to the attorney on the fruits of his labor so as to protect him against an unjust enrichment on the part of a nonpaying client. It is not intended to give a general lien on any other assets of the client. If the attorney's work is sterile and produces no fruit, then he has no lien". At p. 184. (Emphasis added).

Respondent in the present case through preparation and negotiation was able to obtain a settlement offer in the amount of \$39,984.31. At this point in time, the settlement offer changed from an unliquidated claim against defendants to a liquidated claim because the dollar amount was fixed. Therefore, respondent had produced a "fruit" that was ascertainable and fixed for which respondent is entitled to receive its one-third contingency fee of \$13,314.78. The law further provides that an attorney may assert a lien on money due his client even before judgment is rendered or to any funds recovered by an attorney for his client. See generally: 7 Am. Jur. 2d Attorneys at Law, §343 at pp.349-350 citing Wyllie v. Coxe, 56 U.S. 415, 414 L.ed. 753 (1853).

The Utah Statute provides that the lien attaches to the

judgment or proceeds therefrom: "...from the commencement of an action". Respondent submits that its lien attached not later than the date when the cause of action was filed with the court by appellants or the date respondent filed its Notice of Lien with the Salt Lake County and Utah County Recorder on August 16, 1984. While there is no filing requirement under Utah law requiring a Notice of Attorney's Lien, the Supreme Court has held that an attorney's lien is perfected by filing in the office of the County Recorder in the county in which the action was commenced. See: Norton v. McIninch, 50 U.253, 166 P2d 984. Furthermore, Utah's Attorney's Lien Statute is a remedial statute and therefore should be liberally construed. Victor, Gold & Silver Mining Co. v. National Bank of Republic, 18 U87, 55 P2d (1898) and 7 Am. Jur. 2d Attorneys at Law, §325 at p. 338.

POINT IV

RESPONDENT LAW FIRM IS ENTITLED TO AN AWARD OF ADDITIONAL ATTORNEYS' FEES, COURT COSTS AND INTEREST PURSUANT TO CONTRACT.

Respondent Law Firm pursuant to the written agreement between the parties seeks an award of an additional reasonable attorney's fees, court costs and interest pursuant to the contract between the parties. The contract provides:

"In the event I [appellants] fail to pay the fees and costs when billed for whatever reason, I hereby grant my attorneys a lien on said legal matters and agree to pay interest on all amounts overdue 30 days or more at an annual percentage rate of 18% (one and one-half

percent per month) until paid, plus all court costs and reasonable attorney's fees to enforce collection."

Pursuant to the above contractual provision, respondent is entitled to interest at 18% on its \$13,314.78, from the time the settlement proceeds were paid over on February 4, 1985, to the date received, plus an award of costs and additional attorney's fees related to this appeal.

CONCLUSION

Respondent law firm submits that appellants stipulated in open court to allow the District Court to resolve the issue of attorney's fees. Appellant furthermore sought rehearings which were denied by the District Court. Appellant has no material factual issues to be resolved. Respondent Law Firm is entitled to an enforcement of its attorney's lien pursuant to contract and Utah Statute based upon the settlement proposal which respondent Law Firm obtained which was later accepted by appellants. The decision and order of the District Court that respondent Law Firm is entitled to \$13,314.78 should be affirmed. Furthermore, pursuant to contract respondent Law Firm is entitled to an award of an additional attorney's fees, court costs and interest at 18% as provided by contract.


DATED this 15th day of January, 1986,



Stephen R. Randle
Attorneys for Respondent Law Firm
UNGRICHT, RANDLE & DEAMER

CERTIFICATE OF SERVICE

I hereby certify that I served four true and correct copies of Respondent Law Firm's Brief to the Supreme Court to Brian C. Harrison of Harrison & Mullen, 290 West Center, Provo, Utah 84601 this 15th day of January, 1986, postage prepaid.



211h15

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IRVINE, SKEEN & THURMAN 1923
SKEEN, THURMAN, WORSLEY & SNOW 1952
WORSLEY, SNOW & CHRISTENSEN 1967

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Re: Elmer Lee Phillips vs. University of Utah
Hospital, et al.

Dear Mike:

After receiving your letter of June 21, 1984, I have taken occasion to meet with officials at the University and the proposal of settlement contained in your recent letter was carefully reviewed and considered.

I am authorized to conclude a settlement of all claims with the Phillips on the following terms:

1. A cash payment of \$20,000.00.
2. Payment of a further sum equal to any amount hereafter paid to the University Hospital for medical expenses by Mr. Phillips' insurance carrier, in connection with the services rendered to Mr. Phillips at the University Hospital during the period of September 10, 1983 through October 21, 1983.

Hospital records indicate that the total charges for the period September 10 through September 18, 1983 are \$5,965.81. The charges for the hospitalization commencing September 28, 1983 through October 21, 1983 are \$14,018.50. Thus, a total of \$19,984.31 remains unpaid.

We can make no representation as to what amount, if any, Mr. Phillips' insurance carrier will eventually reimburse the

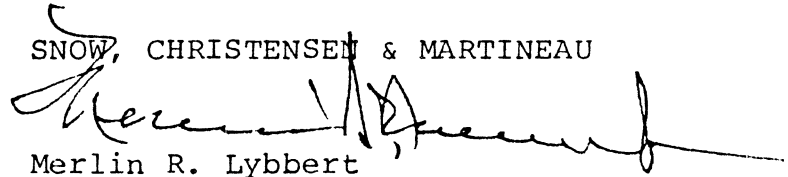
Mr. Michael L. Deamer
Page 2
June 25, 1984

hospital for the services rendered. My inquiry indicates that someone on behalf of Mr. Phillips instructed his insurance carrier not to pay any of the hospital expenses. It would appear that before any of the charges are paid that a letter from Mr. Phillips, or someone on his behalf, will have to be directed to the insurance carrier requesting that such payments be made. If you do not have a copy of the letter, which I have not seen, I will attempt to secure a copy for you so that an appropriate letter may be prepared.

It will require about one week to process a settlement draft after receiving notification of acceptance.

Very truly yours,

SNOW, CHRISTENSEN & MARTINEAU

A handwritten signature in dark ink, appearing to read 'Merlin R. Lybbert', is written over the typed name. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Merlin R. Lybbert

MRL:m